

In the Matter of the Petition of)
) Docket No. UT-_____
 Advanced Telecommunications, Inc),
 Advanced TelCom Group, Inc.,) Petition
 Allegiance Telecom of Washington) Inc.
 Electric Lightwave, Inc., GST Telecom
 Washington, Inc., McLeodUSA Incorporated,
 and NEXTLINK Washington, Inc.,)
)
 for Rulemaking)
 _____)

Pursuant to WAC 480-09-220, Petitioners Advanced Telecommunications, Inc., McLeodUSA, Incorporated, and the Western States Competitive Telecommunications Coalition,¹ representing Advanced TelCom Group, Inc., Allegiance Telecom of Washington, Inc., Electric Lightwave, Inc., GST Telecom Washington, Inc., and NEXTLINK Washington, Inc., (collectively, "Petitioners") respectfully petition the Commission for the adoption of a new rule. The proposed rule, set forth in Appendix A to this petition, would allow end-user customers to take a fresh look at their existing term-contracts with incumbent local exchange carriers, and to be released from these contracts

1 Many of the petitioners are also members of the Western States Competitive Telecommunications Coalition ("WSCTC" or "Coalition"), which represents the interests of facilities-based competitive local exchange carriers in western states. Specifically, Advanced TelCom Group, Inc., Allegiance Telecom of Washington, Electric Lightwave, GST Telecom Washington, and NEXTLINK, Washington, are active members of the Coalition.

if the customers so desire, without incurring penalties from existing termination liability provisions. This proposed rule is necessary in order to open further the telecommunications markets in Washington and to ensure that the local monopolies do not retain their stronghold over customers that wish to take advantage of new competitive choices.

II. STATEMENT OF PETITIONERS' INTEREST AND REASONS FOR ADOPTING NEW RULE

The Telecommunications Act of 1996 ("1996 Act" or "Telecommunications Act") provided for a new partnership between states and the federal government for opening the local exchange and exchange access markets to competition, and promoting increased competition in telecommunications markets already open to competition.² The Telecommunications Act further directed "state[s] to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well."³ The Washington legislature also has declared that it is the policy of the state to "maintain and advance the efficiency and availability of telecommunications;" and "promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state."⁴ The proposed

² See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 96-325, CC Docket No. 96-98, First Report and Order, at paras. 1-3 (1996).

³ *Id.* at para.3.

⁴ RCW 80.36.300.

rule would promote these goals of the Telecommunications Act of 1996 and the Washington state legislature.

Petitioners are new entrants to the local telecommunications market, and have a specific interest in the promotion and development of local telecommunications competition. Thus far, Petitioners have encountered significant competitive disadvantages and barriers to entry in the telecommunications market. Moreover, certain anti-competitive practices of incumbent local exchange carriers ("ILECs") have only further impeded Petitioners' entry into the local exchange market. One example of such an anti-competitive practice is the imposition of termination penalties on customers who terminate their term contracts with ILECs prior to the end of the contract's term. The proposed rule would eliminate this anti-competitive practice, and as such, would advance the opening of telecommunications markets to competition.⁵

⁵ The FCC is currently addressing a similar petition for a declaratory ruling that would outlaw termination liability provisions. See *Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition*, CC Docket No. 99-142, KMC Telecom, Inc. ("KMC") Petition for Declaratory Ruling (filed April 26, 1999) ("KMC petition"). The KMC petition requests that the FCC declare these termination penalties to be unlawful, until such time as customers have "a more genuine competitive choice than currently exists." As the KMC petition noted, the FCC has already addressed the fresh look issue with regard to access markets. KMC petition at 14 and *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992).

Accordingly, the Commission should exercise its legitimate authority to regulate contractual relationships of ILECs to the extent that it is in the interest of public welfare.⁶ The Supreme Court has expressly noted that it is a "well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory authority or constitutional authority, to modify the contract in the interest of the public welfare without constitutional impairment of the contracts."⁷ The Commission

⁶ Other state commissions, such as California, Ohio, Nevada, New Hampshire, and Florida, have already adopted such rules or have opened proceedings to review the issue of whether a Fresh Look rule should be adopted. See *Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition*, CC Docket No. 99-142, Comments of MGC Communications (filed June 3, 1999) ("MGC Comments"), at 8, citing, *inter alia*, *Application of Pacific Bell for Limited Authority to Provide MTS/WATS/800 Contracts*, CPUC D.93-06-032, 49 CPUC 2d 486 (1993) (providing that a 120 day fresh look period shall apply to MTS/WATS/800 contracts); *In the Matter of the Commission Approval of Fresh Look Notification*, Ohio PUC Case No. 97-717-TP-UNC, Finding and Order (Jul. 17, 1997) (adopting Fresh Look guidelines and Notice); *In re Proposed Rulemaking to Adopt "Fresh Look" Regulations for Term Contracts issued by Local Exchange Companies*, Nevada PUC Docket No. 98-12020; *Freedom Ring, L.L.C.*, N.H. PUC DR 96-420, Order No.22798 (Dec. 8, 1997) (granting a fresh look period for customers so that they may terminate long-term contracts with ILECs); see also *Petition to Initiate Rulemaking Pursuant to Section 120.54(7) Florida Statutes, to Incorporate Fresh Look Requirements to all Incumbent Local Exchange Company contracts by Time Warner AXS of Florida, Inc.*, Florida PSC Docket No. 980253 (ongoing rulemaking in Florida to consider Fresh Look rules).

⁷ *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 112 (1937); see also *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412 (1983) (finding that a Kansas statute setting ceiling prices on natural gas did not impair supplier's contracts, and noting that where there is a legitimate public purpose, the state's adjustment of the "rights

also has the authority to adopt the proposed Fresh Look regulations as a part of its existing authority to advance the public welfare and to ensure fair and reasonable rates, tolls, charges, practices, and services.⁸ The Commission's adoption of such rules moreover is imperative to its regulatory role of promoting, as noted above, the development of competition in telecommunications markets.

A. Summary of Proposed Fresh Look Rule

Specifically, Petitioners propose that the Commission adopt a rule that would prohibit ILECs during a specified "Fresh Look

and responsibilities of contracting parties" may be justified); *In re Investigation into the Necessity of Adopting "fresh look" regulations for All Term Contracts issued by Incumbent Local Exchange Companies*, Order of the Nevada Public Utilities Commission in Docket No. 98-5014 (December 8, 1998) (finding that there is no federal or state constitutional prohibition that would preclude the Nevada Commission from initiating a rulemaking docket for the adoption of "fresh look" regulations).

⁸ Currently, the Commission already has authority to regulate the rates, terms and conditions of public utilities pursuant to tariffs, and additionally possesses jurisdiction to review contracts of public utilities. See RCW 80.36.080 (requiring that rates, tolls, contracts and charges, rules and regulations of telecommunications companies be fair, just, reasonable, and sufficient); RCW 80.36.140 (commission may find after hearing that rates, charges, tolls or rentals demanded by a telecommunications company is unjust, unreasonable, and shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force); RCW 80.36.150 (requiring telecommunications companies to file with the commission a copy of any contract, agreement or arrangement with any other telecommunications company or person relating to, among other things, the use of a telecommunications line or service) . Thus, the proposed rules also do not effect a taking without just compensation, as the contracts that ILECs enter into are subject to the Commission's review and modification and therefore, ILECs are not entitled to or guaranteed the rights to such contract terms.

Window" from imposing these termination penalty charges upon customers that terminate early their term contracts with ILECs in order to obtain services from competitive local exchange carriers ("CLECs"). For purposes of this rule, the Commission should adopt the definition of "ILEC" in 47 U.S.C. § 251(h), excluding those ILECs with 25,000 or fewer lines ("small ILECs") from the Fresh Look requirements, until these small ILECs have entered into an interconnection agreement with a competitor.⁹ Because a Fresh Look rule benefits customers in newly competitive markets and areas, the customers of small ILECs should be able to benefit from the rule to the extent that the service area of the small ILEC is opening to competition.

Petitioners also suggest that the Fresh Look Window remain open for different periods of time for: (a) customers of ILECs that are required to obtain inter-Local Access and Transport Area ("LATA") approval under 47 U.S.C. § 271 ("section 271 ILECs") in Washington, and (b) customers of all other ILECs, excluding small ILECs that do not have an interconnection agreement with a competitor.¹⁰ ILECs required to obtain section 271 approval have

⁹ See Appendix A, and see, e.g., *In re Proposed Rulemaking to Adopt "Fresh Look" Regulations for Term Contracts Issued by Local Exchange Companies*, Docket No. 98-12020, Regulatory Operations Staff's Comments on Revised Proposed Regulation of the Public Utilities Commission of Nevada (July 19, 1999) at 2 (noting that small ILECs should be excluded from the proposed Fresh Look Regulations of the Nevada Commission only until they enter into an interconnection agreement with a CLEC).

¹⁰ See Appendix A.

such monopoly power and strength in the local exchange services market that Congress required that these companies obtain approval from the Federal Communications Commission ("FCC") before entering the interLATA market in their regions.¹¹ Accordingly, Petitioners recommend that the Fresh Look Window remain open for customers of a section 271 ILEC for two years after the FCC issues section 271 approval to the ILEC in Washington. Section 271 approval would signal an opening of the section 271 ILEC's relevant local exchange market to competition, but it is likely that the market will not be fully competitive immediately across the state. The Fresh Look rule must remain in effect for two years after the section 271 approval is obtained to enable competition to develop fully and irreversibly in the local market.

For customers of all other ILECs, the Fresh Look Window should remain open for two years after the Commission adopts unbundled network element rates and rules regarding service quality reporting, measures, and remedies, consistent with the FCC's rules and the Communications Act of 1934, as amended. This period of time will ensure that competition will fully develop consistent with the adoption of these rules; that there will be competitive choices available to customers; and that, until

¹¹ See 47 U.S.C. § 271. Section 271 specifically requires any "Bell operating company" or "any affiliate of a Bell operating company" to comply with certain provisions before the ILEC or Bell operating company may provide interLATA services in any of its in-region states.

customers have the ability to choose among various competitive providers, ILEC customers will not be locked into a contract solely because of an ILEC's anti-competitive and termination penalties.

In addition, the Fresh Look rule should apply to any eligible contracts that contain the provision of non-competitive services.¹² Non-competitive services, for example, should include, but not be limited to T-1 loops and T-1 based products, such as digital PBX trunks, PRIs, and ISDN lines. As specified in Appendix A, "eligible contracts" under the Fresh Look rule would include all contracts that exist at the time the rule takes effect and other contracts that are signed after the rule is implemented. In addition to a one-time public ILEC Fresh Look Notice to their customers, ILECs should be required for as long as the duration of their relevant Fresh Look Window, to include language in their contracts notifying their customers of the Fresh Look rules and their rights thereunder. This rule would recognize that a customer who is receiving non-competitive services from an ILEC did not have a choice in choosing the provider for this service, and should therefore be allowed to benefit from taking a "fresh look" at their contracts. The specific provisions of the proposed rule are set forth below in Appendix A.

¹² See Definition of "Eligible Contract" in Appendix A.

B. The Proposed Rule Would Advance the Goals of Competition

As noted, these proposed rules would be consistent with the Federal Telecommunications Act of 1996, and Washington state's public policy goal of encouraging the growth of an emerging competitive and diverse telecommunications market. The proposed rule would prohibit ILECs from continuing at least one of their monopolistic and anti-competitive practices. The practice of locking customers into term contracts by imposing termination liability is unreasonable and anti-competitive for many reasons. Primarily, the imposition of termination liability provisions: (1) unfairly penalizes customers who had no bargaining power or choice in the local exchange market when they initially signed these arrangements; (2) creates stiff barriers to market entry; and (3) perpetuates the ILECs' monopoly power.

The termination penalties unreasonably prevent customers from exercising their right to choose alternative competitive providers. Many customers signed and continue to sign term contracts with ILECs before the arrival of competition to the local telecommunications market, and thus are left unable to take advantage of competing providers' services, without incurring early termination penalties. These customers now find themselves locked into contracts with ILECs because they had no alternative to ILEC service when they first subscribed. Carriers often charge such high installation or other fees for customers in month-to-month plans or provide large discounts for term

contracts that customers are induced to choose a term contract.¹³ In addition, the customer may have accepted the ILEC's service without regard to the contract's terms and conditions, and in some instances, may not have been aware of the termination penalties in these contracts.¹⁴ It is only when a customer wishes to subscribe to another competitive provider of telecommunications services that the customer realizes there may be stiff termination penalties for terminating a contract with the ILEC. For example, in KMC's petition to the FCC for a fresh look rulemaking and in its Reply Comments in the same proceeding, KMC described how a Sprint customer in Florida with a \$2000 monthly phone bill would have faced a termination penalty of more than \$44,000.¹⁵ Because of these penalties, customers may then

¹³ For example, U S West has a tariff in the state of Washington offering customers term contracts for Centrex services, that would include one-time credits of \$60 to \$300, depending on whether the term contract is for 12 months to 60 months. See US West Tariff for Washington, Exchange and Network Services Tariff, Section 9.1.17.E.4. ("Centrex 21 Service") (effective July 26, 1999). The effect of an ILEC's charging high fees for month-to-month service, and providing discounts for long-term contracts is in itself anti-competitive, and especially so when coupled with termination penalties.

¹⁴ These charges are sometimes buried in tariffs. See, e.g., US West Tariff for Washington Exchange and Network Services Tariff, Section 9.1.17.B.12 ("Centrex 21 Service") (providing termination charges for early termination of contracts). In MGC's comments filed in the FCC rulemaking on this issue, MGC noted that one of its customers, a church, received a bill from an ILEC for approximately \$12,000 for prematurely ending a long-term contract about which the customer was ignorant. See MGC comments at 4.

¹⁵ *Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition*, CC Docket No. 99-142, Reply Comments of KMC (filed June 18, 1999).

decide not to change their service to a more competitive, efficient provider of telecommunications services.

The termination liability provisions prevent CLECs from obtaining customers and from developing a viable market presence by effectively forcing customers to remain in service arrangements against their will. One competitive carrier has noted in the course of the FCC's rulemaking on fresh look provisions that it has found that "ILECs begin to employ contracts with excessive termination penalties, or seek tariffs with special conditions that provide for excessive termination penalties, in markets that are *poised* to experience competition."¹⁶ The imposition of termination penalties on customers who often did not have a choice in providers when they first entered into these contracts is a clear example of how ILECs abuse their bargaining power in the local exchange market and prevent CLECs from entering the market.

KMC also discussed in the FCC proceeding specific instances of ILEC customers desiring to switch to KMC, only to learn of the termination charges, and thereafter, revoking their intention to transfer their business to KMC.¹⁷ In some instances, ILECs have even been successful in delaying or creating further roadblocks to a customer's choice, by asserting that the customer has contracts with termination penalties even though the ILEC cannot

¹⁶ MGC comments at 5.

¹⁷ *Id.* at 2-3.

provide proof of the existence of such a contract. In those cases, the CLEC and the customer that seeks to migrate or transfer service to the CLEC may spend weeks trying to obtain the necessary documentation or proof of a contract from the ILEC, only to find later that the ILEC cannot locate or produce the contract.¹⁸ Thus, by imposing termination penalties or even the threat of termination penalties, ILECs are able to perpetuate their monopoly power or delay the development of competition. At this critical juncture when CLECs attempt entry into the local market, the ability to win customers is essential. Without obtaining customers now, CLECs may not be able to sustain the momentum to provide efficient competitive alternatives later.

These detrimental, anti-competitive effects of termination liability provisions illustrate the necessity for the proposed Fresh Look rule;¹⁹ and the Commission should thus adopt the

¹⁸ ATG, one of the petitioners named herein, has experienced exactly such problems.

¹⁹ Section 251(c)(4) of Act imposes a duty on ILECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service." Further, Section 253 of the Act prohibits states from prohibiting or effectively prohibiting "the ability of any entity to provide any interstate or intrastate telecommunications service." As noted in the KMC petition to the FCC, termination charges have the "effect of prohibiting competitive entry" and states should not approve or allow enforcement of these termination penalties to continue. KMC Petition at 9.

proposed rule to allow customers to be released from such anti-competitive contracts.²⁰ As illustrated, a rule allowing customers to take advantage of new competing providers is essential in order: (1) to allow customers to be able to choose among new market entrants without being subject to unreasonable termination penalties ; (2) to open telecommunications markets and develop competition; and (3) to prevent ILECs from continuing to exercise and abuse their market power.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully petition the Commission for adoption of the proposed rule, as necessary to prevent the anti-competitive effects resulting from the ILECs' enforcement of the early termination penalty provisions set forth in term contracts.

Respectfully submitted this 24th day of September, 1999.

²⁰ In the event that the Commission finds that some amount of termination penalty may be imposed, the Commission should ensure that, in adopting the "fresh look" rule, the termination penalty not exceed the lesser of: (a) the amount owed under the termination provision of the customer's existing contract with the ILEC; or (b) the difference between the amount the customer has already paid under the contract and the charges the customer would have paid if the customer had entered into a contract for the term actually used. See, e.g., *Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition*, CC Docket No. 99-142, Joint Comments of the Association for Local Telecommunications Services, Net2000 Communications, Inc., and Teligent, Inc. at 6-7 (filed June 3, 1999) (noting that one possible way of invalidating excessive termination penalties would be to limit an ILEC's recovery to no more than the amount that the customer would have paid for the services actually used).

DAVIS WRIGHT TREMAINE LLP
Attorneys for Advanced
Telecommunications, Inc., Advanced
TelCom Group, Inc., Allegiance
Telecom of Washington, Inc.,
Electric Lightwave, Inc., GST
Telecom Washington, Inc.,
McLeodUSA Incorporated, and
NEXTLINK Washington, Inc.

By _____
Mark P. Trinchero
Gregory J. Kopta

PETITIONERS

Kath Thomas
General Counsel
Advanced Telcom Group,
Inc.
100 Stony Point Road,
Suite 130
Santa Rosa, CA 95401
Ph: (707) 535-8999
Fax: (707) 535-8909

Robert W. McCausland
Vice President,
Regulatory &
Interconnection
Allegiance Telecom of
Washington, Inc.
1950 Stemmons Freeway,
Suite 3026
Dallas TX 75207
Tel.: (214) 261-8730
Fax: (214) 261-8770

Penny Bewick
Director- Government
Affairs & Product Support
Electric Lightwave, Inc.
4400 NE 77th Avenue
Vancouver, WA 98662
Ph: (360) 816-3381
Fax: (360) 816-3821

William P. Heaston
Associate General Counsel
McLeodUSA Incorporated
P.O. Box 66
Irene, SD 57037
Tel. (605) 263-7212
Fax (605) 263-3844

David Patterson
Advanced Telecommunications,
Inc.
730 2nd Avenue South, Suite
1200
Minneapolis, MN 55402
Ph: (612) 376-4426
Fax: (612) 376-4411

Timothy H. Peters
Vice President,
Government and Industry Affairs
Electric Lightwave, Inc.
4400 NE 77th Avenue
Vancouver, WA 98662
Ph: (360) 816-3989
Fax: (360) 816-3821

Gary Yaquinto
Vice President,
Government and Regulatory
Affairs
GST Telecom Oregon, Inc.
4001 Main Street
Vancouver, WA 98663
Tel. (480) 964-3888

Alaine Miller
Director -Reg. & Public Policy
NEXTLINK
500 108th Avenue NE, Suite 2200
Bellevue, WA 98004
Ph: (425) 519-8954
Fax: (425) 519-8911

APPENDIX A

PROPOSED RULE

WAC 480-120-XXX

a. Termination of Customers' Eligible Contracts with
Incumbent Local Exchange Carriers:

(1) During a "Fresh Look Window," any customer of an incumbent local exchange carrier ("ILEC") shall be allowed to terminate eligible contracts prior to the expiration of the contract term by written or oral notice, without incurring termination liability, for the purpose of acquiring services from, or entering into, a contract with a competitive telecommunications carrier. The Fresh Look regulations shall not apply, however, to ILECs with 25,000 total access lines or fewer ("small ILECs") in Washington, unless such ILEC has an interconnection agreement with a CLEC.

(2) The Fresh Look Window shall commence upon adoption of this rule and shall remain open to:

(a) customers of ILECs that are required to obtain inter-Local and Access Transport ("LATA") approval in Washington under 47 U.S.C. § 271, for a period of two years after the market for local exchange services is irretrievably opened to competition such that the Federal Communications Commission ("FCC") issues an approval pursuant to 47 U.S.C.

§ 271 for the ILEC to provide in-region interLATA services in Washington state; and

(b) customers of all other ILECs (excluding small ILECs that do not have an interconnection agreement with a competitor) for two years after the Commission adopts unbundled network element rates and rules regarding service quality reporting, measures, and remedies, in compliance with the Communications Act of 1934, as amended, and FCC rules.

(3) During the Fresh Look window, an ILEC may not charge an early termination penalty, fee, or charge to customers that terminate eligible contracts prior to the expiration of the contract term.

(4) All eligible contracts that include the provision of non-competitive services will be subject to the Fresh Look regulations.

5) Upon adoption of this rule, the Commission shall issue a Fresh Look Notice ("Commission Fresh Look Notice") to the public, describing the purpose of this rule and the Fresh Look process.

(6) Each ILEC shall provide the Commission Fresh Look Notice to customers inquiring about the provisions of this Rule or the consequences of early termination of eligible contracts by U.S. mail within ten (10) business days of the inquiry.

(7) (a) Within 45 (forty-five) days of the effective date of this regulation, each ILEC shall provide a one-time public notice ("ILEC Fresh Look Notice") to all of its customers with eligible contracts in Washington. The ILEC Fresh Look Notice shall be in the form of a bill insert that will be approved in advance by the Commission.

(7) (b) Upon the effective date of the Fresh Look regulations, all future contracts between an ILEC and its customers shall contain language notifying the customer of the Fresh Look regulations.

(8) Each ILEC shall establish a point of contact within such carrier for all Fresh Look inquiries.

(9) All disputes concerning eligible contracts, termination liability, Fresh Look Notices, or other matters within the scope of this Rule shall be resolved by the Commission.

b. The Definitions for this proposed rule are set forth as follows:

Incumbent Local Exchange Carrier (ILEC) is defined pursuant to section 251(h) of the Telecommunications Act of 1996, 47 U.S.C. § 251(h), as any local exchange carrier that: (1) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (2) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the FCC's regulations; or (3) is a person or entity that, on or after such date of enactment, became a successor or

assign of a member described in (2). The Fresh Look regulations shall not apply, however, to ILECs with 25,000 total access lines or fewer in Washington, unless such ILEC has an interconnection agreement with a CLEC.

Eligible contracts means contracts including, or tariffs pertaining to, non-competitive services provided by an ILEC to its customers, which have a period of six months or longer remaining under the contract.

Fresh Look Window means the period of time during which ILEC customers may terminate their eligible contracts prior to the expiration date, without incurring termination liability, consistent with this rule.